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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 724

SOUTHWEST MAGAZINE CO., *Petitioner*

vs.

CITY OF FORT WORTH, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND SECOND COURT OF CIVIL APPEALS OF TEXAS

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Petition for Writ of Certiorari

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No. .....

SOUTHWEST MAGAZINE CO., *Petitioner*

vs.

CITY OF FORT WORTH, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND SECOND COURT OF CIVIL APPEALS OF TEXAS

Petitoner, Southwest Magazine Co., respectfully prays that a writ of certiorari issue to review the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and order of the Supreme Court of Texas adopting said opinion by refusing to review said opinion upon application for writ of error, indicating that the honorable Court of Civil Appeals committed no *reversible* error.

Opinions Below

Jurisdiction

OPINIONS BELOW

The declaratory judgment and opinon of the trial court, The 17th District Court, Tarrant County, Texas, is appended to this petition as Appendix A.

The opinion of the Court of Civl Appeals for the Second Supreme Judicial District of Texas appears at 358 S.W. 2d 139, and is appended to this petition as Appendix B.

The order of the Supreme Court of Texas refusing application for writ of error with the notation "no reversible error" is appended to this petition as Appendix C.

JURISDICTION

This court has jurisdiction under 28 U.S.C. Sec. 1257 (3), petitioner claiming violation by respondent of title, rights, privileges and immunities guaranteed petitioner under the Constitution of the United States, Fifth Amendment, and of the State of Texas, Article 1, Section 17.

The order of the Supreme Court of Texas refusing writ of error to review the opinon of the Second Court of Civil Appeals is dated October 3, 1962. The order of the Supreme Court of Texas overruling petitioner's

motion for rehearing on application for writ of error is dated October 31, 1962. This petition is filed within 90 days as required by 28 U.S.C. Sec. 2101 (c), all state remedies having been exhausted.

Questions Presented

QUESTIONS PRESENTED FOR REVIEW

(1) May the City and State, in connection with a new freeway project, confiscate and destroy a railway spur track which has served petitioner for 55 years, thus destroying its business, compelling it to abandon its property, and severely damaging the market value of the land remaining, without compensating petitioner for its damage.

(2) Does an abutting property owner who owns fee title to land subject to a public street easement, and who also uses such land for access to his abutting land by railway easement, have an interest in his land entitled to protection under the Fifth Amendment to the Constitution of the United States?

(3) Is the police power invoked to such an extent in the removal of petitioner's spur track that its property may be confiscated and damaged, and its business ruined, without compensation; or is the case presented one for the exercise of the power of eminent domain, with the correlative Constitutional duty to compensate the property owner devolving upon the state?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in essence:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner, Southwest Magazine Co., is a Texas corporation, incorporated since 1922, engaged in the operation of a printing plant located on property at the corner of Seventh and Jones Streets, Fort Worth, Texas (Tr. 42, 48). The land is owned under deed dated March 23, 1923, (Tr. 49). Said land was patented by the State of Texas to petitioner's predecessor in title, Middleton T. Johnson, (Tr. 50) who platted and subdivided same into town lots in 1856, (Tr. 52). The dedication was confirmed by the town property owners in 1877, (Tr. 27-30).

In 1907, after popular vote of the citizens of Fort Worth, the City passed an ordinance granting, by its terms, a "*right of way*" to install railroad tracks and spur tracks in Seventh Street adjoining petitioner's land and serving said land, and designating

such land to be "*track property*". (Tr. 54) A railroad spur track was laid in Seventh Street serving petitioner's premises, and the printing plant was constructed and began operation in about 1907. (Tr. 36).

Petitioner's building is specially constructed to contain its huge and cumbersome printing presses. It is not readily adaptable to any other use than a printing plant (Tr. 36). The newsprint used in the printing operation is supplied in large, heavy, cumbersome rolls delivered on railway cars on the spur track in question, which serves only petitioner's premises. (Tr. 36-38, and see series of photographs Tr. 56-60).

In October, 1959, C. M. Thelin, Public Works Director for respondent City of Fort Worth, notified petitioner that the City is going to remove the spur track serving petitioner from Seventh Street, and that the City refused to compensate petitioner for its resulting damage. (Tr. 38) He has also notified petitioner that no other permanent provision can be made for supplying newsprint to its printing plant. (Tr. 38-39)

It is undisputed that removal of the spur track will put petitioner out of business at that location, greatly diminish the value of its property, and compel petitioner, at great expense, to abandon its plant property and move to a new location. (Tr. 39-40)

RULINGS UPON FEDERAL QUESTIONS BELOW

Petitioner filed this suit in the 153rd District Court, Tarrant County, Texas, for declaratory judgment that it is possessed of vested property rights entitled to protection under the Fifth Amendment, U. S. Constitution, and the corresponding provision of the Texas Constitution. (Tr. 6-7) Respondent filed a counter-motion seeking declaration that petitioner is not entitled to Constitutional compensation, as the confiscation is a pure exercise of police power. The case was submitted upon affidavits and briefs on July 14, 1961, and argued before the trial court, who took the case under advisement, and in September, 1961, rendered summary declaratory judgment: (1) That petitioner owns fee title to the center of Seventh Street, subject only to a street easement in favor of respondent city; (2) As abutting landowner, petitioner has greater rights in the street than the general public, including absolute fee title if the street is vacated, rights of ingress and egress, light and air, protection against closing or obstruction of the street to its damage, and the right to impose railroad and other easements which do not interfere with the street easement; (3) That City Ordinance #980 (Tr. 54) created a perpetual easement for rail traffic in the street in petitioner's favor which enhanced the value and usefulness of petitioner's property as "trackage property", and not a franchise "for the use or control of a public utility", which easement became a part of the rights and hereditaments going with

petitioner's abutting land, and petitioner has a vested right in same; (4) That the removal of the spur track is a taking of property for which petitioner must be compensated under the Constitution, although the police power is incidentally involved, saying:

> "The police power of the state, though essential to orderly government, must still be subordinated to constitutional rights. Any slight deviation from these fundamental rights, though insignificant standing alone, is actually the beginning of a gradual process of erosion by which such guaranteed rights are finally lost. The police power is incidentally involved in the widening of a street for the safety of the public, but no one would seriously contend that compensation should not be required in such cases. The desire to improve the public welfare and safety can not be legally achieved by placing the burden of the cost upon an individual."

Respondent perfected appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, which reversed the judgment of the trial court, and rendered judgment for respondent, admitting that petitioner owns fee title to the street where the spur track lies, but saying that although the spur track is not a present hazard, its removal is an exercise of the police power, and petitioner is not entitled to constitutional compensation for the confiscation and damage.

The Supreme Court refused to grant writ of error and consider the case. Petitioner perfected its constitutional question by Point One in the Application

for writ of error, stating:

> "The Court of Civil Appeals erred in holding that petitioner's property may be confiscated by Respondent City for public works, without compensation, in violation of the Fifth Amendment of the United States Constitution, and Article 1, Section 17, Texas Constitution."

ARGUMENT—REASONS FOR GRANTING WRIT

I. *The opinion below conflicts with applicable decisions of this court.*

This honorable court has repeatedly held, in situations similar and analogous to the case at bar, that the landowner must receive compensation for his damages and loss of property under the Constitution, and that the police power does not justify confiscation without such compensation.

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 37 L.Ed. 463, 13 S. Ct. 622 (Sup. Ct. U.S. 1893), the Federal Congress appropriated an insufficient fund for the acquisition of certain locks and canals owned by plaintiff, and expressly legislated that it would not be compensated for loss of toll revenues. This court, speaking through Justice Brewer, held such action unconstitutional, saying:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construc-

tion deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

"The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such 'compensation' by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.' It cannot be doubted in view of the long list of authorities—for many more might be cited—that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela river as in its judgment the public interests demand. Its dominion is supreme.

"But like the other powers granted to Congress by the Constitution the power to regulate commerce is subject to all the limitations imposed by

> such instrument, and among them is that of the 5th Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation."

The close similarity to this case, and applicability of this court's reasoning to this case, is obvious.

Another closely similar situation was presented to this court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321 (Sup. Ct. U. S. 1922), where the validity of the Kohler Act, passed by the Pennsylvania Legislature was questioned. The act prohibited undermining streets and private structures by coal companies, and was attacked as void, for unlawful confiscation of property (underground coal) without compensation. Justice Holmes, so holding, said:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Thus we think that we are warranted in assuming that the statute does.
>
> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter with-

> out compensation then there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much. The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. Hairston v. Danville & W. R. Co. 208 U.S. 598, 605, 52 L.Ed. 637, 639, 28 Supt. Ct. Rep. 331, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears But that cannot be accomplished in this way under the Constitution of the United States. . . .
>
> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & B.R. Co., 172 Mass. 488, 489, 43 L.R.A. 832, 70 Am.Neg.Rep. 367. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

In another analagous situation, this court, in *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 48 S. Ct. 276, 72 L.Ed. 523, 56 A.L.R. 756, 761, 762, 763 (Sup.Ct., U.S. 1928), confronted with the question whether the City might create a private hack stand on railroad station grounds by ordinance, held that such action could not be taken under the guise of

the police power without compensation to the landowner, saying:

> "Is the provision of the ordinance of October 22, 1924, declaring a part of the driveway to be a hack stand a valid exercise of the police power? We assume that by the laws of the state the town is authorized to regulate traffic and to establish public hack stands in its streets and other public places. It does not claim the power to take or appropriate private property for such a purpose without giving the owner just compensation, but it contends that the establishing of this hack stand 'was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway', and that it does not take private property for public use without compensation 'because the lands taken are devoted to a public use'. But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 67 L.Ed. 322, 326, 28 A.L.R. 1321, 43 Sup.Ct.Rep. 158. *The police power may be and frequently it is exerted to effect a purpose or consumate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him.* The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purpose of its business as a common carrier; and, while that business is subject to regulation in the pub-

lic interest, the property used belongs to petitioner. The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the 14th Amendment.

"As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner as an incident of its ownership and in order to make profit for itself has a right to use or permit others to use such land for any lawful purpose.

"Under the guise of regulation, the town cannot require any part of the driveway to be used in a service that petitioner is under no duty to furnish. And, as petitioner's duty here involved is confined to the business of carrying passengers by railroad, the declaration of the ordinance that the specified part of the driveway 'is hereby designated and established as an additional public hack stand' clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked."

Respondent has repeatedly argued to the courts be-

low that petitioner has no vested rights, and that in any event, "the end justifies the means," and the courts below have responded to the dulcet tones of the siren's call, heedless of the vast and far reaching consequences of such a decision, and have held that the confiscation of private property by the state "for the good of the whole" is a valid and necessary exercise of the police power.

All other property being taken for use in the installation of the freeway is being purchased or condemned, in exercise of the power of eminent domain. (Tr. 68 Thelin deposition pp. 70-72) The City in this situation alone refuses to pay for the property taken, and consequential damages, under the guise of the police power. Such arbitrary seizure of private property may be accepted standard procedure in totalitarian states. However it strikes a mortal blow to the very foundation of the American system of government by Constitutional Law.

Respondent here asserts the right and power to destroy the inaleinable vested constitutional rights of the American citizen, which set him apart and distinct from all other peoples on earth. In essence, the question again before this court is, will those rights guaranteed the private citizen by the Federal Constitution be again recognized and protected by this court, or will it allow the beginning of a process of erosion culminating with their destruction?

The holding of the trial court in this case is correct in all respects. The Court of Civil Appeals has erred in reversing said opinion, and has rendered an opin-

ion in direct conflict with the decisions of this court cited above, and in derogation of the Fifth Amendment of the Constitution. That opinion the Texas Supreme Court has refused to review, stating that the opinion "presents no error requiring reversal of the judgment of the Court of Civil Appeals."

For the foregoing reasons, this court should grant writ of certiorari, review and reverse the opinion of the Court of Civil Appeals, and affirm the trial court.

II. *This petition presents a federal question of substance not heretofore decided by this court.*

Only one American court was found to have passed on the precise question at bar in our search of authorities. The holding of that court supports petitioner's contention. To our knowledge, this court has never passed upon this precise question, although the authorities above cited are believed to be strong authority for petitioner's position.

The Supreme Judicial Court of Massachusetts, in *New York, N.H. & H.R. Co. v. Blacker*, 178 Mass. 386, 59 N.E. 1020 (1901), had before it a situation where the City removed spur tracks leading to and into Plaintiff's premises by abolishing grade crossings and changing the height of the grade of the railroad adjacent to plaintiff's premises. In holding that the abutting property owner was entitled to damages for removal of the spur track, the court said:

> "The fact this land was situated on the line of the railroad, and at a level with it, so that spur tracks could be (as they were) built, running on to it, made it valuable for any business which

could be economically carried on by having freght delivered to it directly from the cars without the expense of handling and carting. That was an element which in fact gave, or might have given, value to this land, and which could be properly considered in determining what the fair market value of it was. If the defendants were right in the contention that this fact could not be considered, because the petitioner had no legal right to have the spur tracks continue, the fact that a lot of land is in the business portion of a city or town, in place of in the residential or other less valuable portion of it, could not be taken into consideration in determining its market value. The owner of a lot of land in the business center of a city has no legal right to have the business of the city done in that neighborhood; but the fact that it is done therein, and is likely to continue to be done there, is a fact which affects the market value of the land. Instances where circumstances which exist, but which the owner has no legal right to continue to have exist, have been taken into account in determining the market value of land, are common."

Under the reasoning in the foregoing opinion, the Texas Court of Civil Appeals has erred in holding that petitioner is not entitled to constitutional compensation because it has no right to have the spur track continued indefinitely.

A Federal question of substance is here presented, property rights of an American citizen being confiscated in violation of the Fifth Amendment.

A closely similar case was presented to this court in *Grand Trunk W. R. Co. v. South Bend*, 227 U.S.

544, 57 L.Ed. 633, 33 S.Ct. 303 (Sup. Ct. U.S. 1912) under the contract clause. The court, in holding the conduct of the City in that case unconstitutional, said:

> "The state, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. Walla Walla v. Walla Walla Water Company, 172 U.S. 17, 43 L.Ed. 348, 19 Sup.Ct.Rep. 77. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, cannot be treated as unlawful, either in maintenance or operation — The power to regulate implies the existence, and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract . . . Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the streets has been delegated to the municipality."

This court used the terms "franchise" and "easement" in a somewhat interchangeable sense in the South Bend opinion. The distinction between the two is sharply drawn in this case. The court below has held that the spur track constituted nothing more than a franchise which had long ago expired. Petitioner contends and the trial court agreed, that it constitutes a perpetual easement *upon its own land* of access to

abutting property by rail, which is appurtenant to its land.

But even beyond this argument, fundamental and important though it may be, the *abutting land itself* is heavily damaged in value, and petitioner's business of 55 years on said land is destroyed, forcing it to abandon the land.

As stated in *McQuillan on Municipal Corporation*, Second Edn., Vol. 4, p. 349,

> ". . . it is generally held that private property forbidden to be taken or damaged by the constitution for public use without just compensation is not limited to tangible subject matter or corpus of property, but includes the right of use and enjoyment of it, so that when such rights are destroyed or taken for public use the owner is entitled to compensation . . . So the rights of an abutting owner, although he *does not* own the fee of the street, are property rights which cannot be taken or injured without compensation.
>
> "Property in a thing consists not merely in its ownership or possession but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property to that extent destroys the property itself. The substantial value of property lies in its use. If the right to use be denied, the value of property is annihilated and ownership is reduced to a barren right." *Span v. City of Dallas*, 235 S.W. 513 (Tex. Sup. Ct. 1921).

It is clear that the court below has committed serious error on a Federal question of substance which has not been passed upon directly by this court.

III. *The question herein presented is of great and recurring significance in application of the power of eminent domain.*

Under modern conditions, with motor vehicular traffic constantly and heavily increasing, and vast extensions and improvements of the street and highway systems throughout the nation under way and on the planning boards, and more to come, the problem at bar is of immediate and compelling importance. If the constitutional rights of petitioner should be allowed to be ignored and destroyed under the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, a leak has indeed pierced the dyke of Constitutional containment. A flood of repeated and greater abuses of the police power will follow, with condemning authorities throughout the nation becoming bolder and increasing the ambit of application of this ruling. Eventually, ownership of private property will be reduced to a meaningless, hollow shell. The rights of the American citizen will be no more than those of the citizen in a totalitarian, communist nation. A cornerstone of the structure of the American system of government will have been removed.

CONCLUSION

The trial court correctly held that respondent cannot seize and destroy the easement of access by rail by removing trackage from petitioner's own property, destroying its business and damaging the value of the real estate remaining, without constitutional com-

pensation, under the guise of the police power. The Court of Civil Appeals has erred in holding to the contrary, and the Supreme Court of Texas has erred in refusing to consider the case upon the statement that the error of the Court of Civil Appeals is not reversible. Writ of certiorari should be granted and the Court of Civil Appeals reversed and the trial court affirmed, under the Fifth Amendment of the Constitution of the United States.

Respectfully submitted,

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Copies of this petition for certiorari have been served as provided by Rule 33, by personal delivery to counsel or a clerk in the office of S. G. Johndroe, Jr., City Attorney, City Hall, Fort Worth, Texas, this 27th day of December, 1962.

H. Hooper
Of Counsel for Petitioner

APPENDIX A

NO. 17531-C

Southwest Magazine	)	In The District Court
vs.	)	Tarrant County, Texas
City of Fort Worth	)	17th Judicial District

SUMMARY DECLARATORY JUDGMENT

On the 14th day of July, 1961, came on to be heard the motion for summary judgment of plaintiff, Southwest Magazine, and counter motion for summary judgment of defendant, City of Fort Worth, in the above entitled and numbered cause. Came plaintiff through its agents and counsel and announced ready for trial, and came defendant through its agents and counsel and announced ready for trial. The court proceeded to hear and consider the pleadings, affidavits, and depositions offered by the respective parties, arguments and trial briefs submitted by respective counsel, and the law bearing upon the subject matter of this dispute, and being of the opinion that plaintiff's motion for summary declaratory judgment should be granted, and defendant's counter motion for summary judgment should be denied, and having made all findings necessary to support this judgment, including the finding that a justiciable controversy exists between the parties, and the finding that no issue of fact exists requiring trial other than by summary judgment procedure, it is accordingly

ORDERED, ADJUDGED, DECREED, DETERMINED AND DECLARED as follows:

(1) The City of Fort Worth, defendant, holds

nothing more than a street easement in the section of East Seventh Street adjacent to plaintiff's premises at the corner of Seventh and Jones Streets, Fort Worth, Tarrant County, Texas.

(2) Plaintiff, Southwest Magazine, as an abutting owner of real estate, owns the fee title to the center of East Seventh Street adjoining the property line of its premises, subject to the street easement of defendant, City of Fort Worth.

(3) As an abutting owner, plaintiff has greater rights in the street than the general public, including absolute fee title in the event the street is closed or abandoned, the right of ingress and egress, certain rights to light and air, the right to protection against closing or obstruction of the street to its damage, and the right to participate in the enjoyment of the street easement by imposing thereon railway or other easements which do not interfere with the street easement of defendant City.

(4) Ordinance No. 980 of the City of Fort Worth created an easement for railroad traffic superimposed upon the street easement for the benefit of the City of Fort Worth and the abutting property owners adjoining East Seventh Street. This railroad easement is perpetual in nature, and had the effect of enhancing the value and usefulness of plaintiff's land as trackage property. It did not involve the granting of a franchise "for the use or control of a public utility". The spur track in question having been placed on the land which plaintiff and the other owners actually held in fee simple, subject only to the City's easement,

it became a part of the rights and hereditaments going with the land of plaintiff as an abutting landowner, and plaintiff acquired a vested right in the same.

(5) The next question to be determined is whether such right of way granted for the spur track may be terminated without compensation to the adjoining or abutting owners. Counsel for the City contend that the City of Fort Worth has the right to remove the spur track without compensation to the plaintiff, because they contend such removal is an exercise of the police power. Attorneys for the plaintiff contend that it is actually a taking of private property which must be accomplished by the City under its power of eminent domain.

It is the holding of the court that the removal of the spur track by the City would not be an exercise of the police power, but actually a taking for which the plaintiff should be compensated. The affidavit and deposition of Mr. Thelin, at most, indicates that the police power is only incidentally involved. That the health, convenience, safety and welfare of the public is paramount must be conceded. The right of eminent domain, as well as the shadowy area encompassed within the pale of the police power, are both predicated upon this great principle. The police power is frequently exerted to effect a purpose in the public interest, but regardless of the purpose, if the means involved requires the taking of private property, the owner is entitled to compensation for that which is taken from him. The exercise of the police power

should be strictly construed to matters pertaining to regulation or destruction of private property detrimental to the public welfare. In such cases, no compensation can be claimed. However, when private property is applied to public use, and such use is beneficial to the public, the owner is entitled to compensation, whether the taking is by eminent domain or under the guise of the police power. The police power of the State, though essential to orderly government, must still be subordinated to constitutional rights. Any slight deviation from these fundamental rights, though insignificant standing alone, is actually the beginning of a gradual process of erosion by which such guaranteed rights are finally lost. The police power is incidentally involved in the widening of a street for the safety of the public, but no one would seriously contend that compensation should not be required in such cases. The desire to improve the public welfare and safety can not be legally achieved by placing the burden of the cost upon an individual.

It is undisputed that an injury will result to the plaintiff by the removal of the spur track. The nature and extent of the damages is not before the court in this proceeding. Whether the cost of maintaining a separate warehouse and drayage to the plant would be the difference between the plaintiff being in or out of business must be determined in another proceeding.

There being no issue of fact here involved, plaintiff's motion for summary judgment is granted and defendant's motion for such relief is denied.

It is further ordered, adjudged and decreed that all costs of this proceeding be, and they are hereby assessed against defendant, for which let execution issue.

SIGNED, RENDERED AND ENTERED this 14th day of September, 1961.

/s/ Harold Craik
Judge Presiding
17th District Court
Tarrant County, Texas

APPENDIX B

No. 16328

IN THE COURT OF CIVIL APPEALS
FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

CITY OF FORT WORTH — APPELLANT

VS.

SOUTHWEST MAGAZINE — APPELLEE

FROM THE DISTRICT COURT OF
TARRANT COUNTY

OPINION

The trial court entered a summary declaratory judgment in which it decreed that the plaintiff Southwest Magazine had such interest in a spur railway track owned by the Chicago, R. I. & Gulf Railway Co. in Seventh Street as to entitle plaintiff to damages against the City of Fort Worth for removal thereof.

By ordinance effective Feb. 8, 1907, the City provided: "Section 1. That the Chicago Rock Island & Gulf Railway Company is hereby authorized and empowered to construct, equip, operate and maintain a line of railway over, upon and across the following named streets in the city of Fort Worth, Tarrant County, Texas, to-wit: one track in the center of Seventh Street, from the east line of Pecan Street to

the east line of Rusk Street, crossing all intervening streets by whatever name known, between said points, with the right and priviege of constructing, operating, equipping and maintaining a spur or switch tract on either side of said main tract, opposite each block of ground located between Pecan Street on the east and Rusk street on the west, so as to make each block of said ground what is known as 'Tract property.'" Section 2 provided in part: "It shall be the duty of The Chicago, Rock Island & Gulf Railway Company to construct and maintain its said line on Seventh Street, between the points above named, and the spur tracts on either side to accommodate each block between Pecan and Rusk Street. . . ."

A spur track serving Seventh Street between Grove and Jones Streets is the subject of this controversy.

The Chicago, Rock Island & Gulf Railway Company is not a party to the instant suit.

The City appealed from the judgment.

It contends: "Since appellee cannot, as a matter of law, have a vested right or irrevocable special privilege to have a railroad spur track permanently maintained in the street superior to the right of the public to use the street and superior to the right and duty of the city's legislative body to control the public streets, the court erred in rendering summary judgment against appellant."

Plaintiff defends the judgment on the contention that the spur track constituted an easement superimposed on the street easement of the City and that it

had a vested right to such easement subject to protection under the State and Federal Constitutions, and was entitled to compensation for the easement and removal of the track.

Plaintiff has owned the lot at the corner of Seventh Street since 1923. It has been doing business at that location since 1922. The area was platted and subdivided into town lots in 1856, and the dedication reconfirmed in 1877. In 1907, or soon thereafter, the spur track in question was constructed and put into operation and has continuously served that particular block. The track is located entirely within the confines of Seventh Street.

The building on plaintiff's premises was erected in 1907 and was designed for the purpose of operating a printing plant; newsprint used in the printing operation is received in large, heavy cumbersome rolls, and delivered by the Railroad on the spur track. A heavy hardship will befall plaintiff if it cannot continue the use of the spur, both because of loss of customer purchases and cost of moving.

Although the ordinance heretofore mentioned did not fix a time limit for the franchise and "privilege of . . . operating . . . and maintaining a spur", the City's charter then in force and effect provided that no franchise for a longer period than twenty-five years should ever be granted or given by the City of Fort Worth. The franchise to the Railroad therefore expired in 1932. The record in the instant suit is silent as to any extension of the old or grant of a new franchise to the Railroad.

As a general rule the owner of a lot or a tract of land abutting upon a street acquires the fee to the center of the street subject only to the easement existing in favor of the public. *Quanah Acme & P. Ry. Co. v. Swearingen*, 4 S.W. 2d 136; 39 *Tex. Jur.*, p. 584. Sec. 51. Under the police power, however, the use of property may be restricted to reasonable exercise when public safety or convenience so requires. *City of Fort Worth v. Southwestern Bell Tel. Co.*, 80 Fed. 2d 972.

In *J. M. Radford Grocery Co. v. City of Abilene*, 34 S.W. 2d 830, the Commission of Appeals held, in a case where the city had previously granted an abutting owner permission to build a platform in the street flush with the curb, that primarily the platform was erected and used by the company for private purposes and did not vest the company with a permanent property right. It was held the city was without power thus to surrender its authority over any portion of the street or to authorize the company permanently to appropriate to a private use the part of the street upon which the platform stood.

In case of conflict of interest between the public using the street and the railroad, the interest of the public is paramount, and the state may constitutionally insist that the streets be kept free of danger. *Erie R. R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394.

It was held in *City of San Antonio v. Pigeonhole Parking of Texas*, Sup., 311 S.W. 2d 218, that, while the right of access of an abutting owner cannot be

taken or destroyed without adequate compensation, the rule does not apply when a municipality invokes its police power for the protection of the health, safety and general welfare of its citizens.

According to *Black's Law Dictionary*, Fourth Edition, "In real property law, the term 'access' denotes the right vested in the owner of land which adjoins a road or other highway to go and return from his own land to the highway without obstruction." In the instant case the City is not taking away plaintiff's "access" to its property, but is, by removing the spur tracks, taking from plaintiff the right to have boxcars moving and standing in a public street in front of plaintiff's building.

The City has a nondelegable and inescapable duty to maintain its streets in usable condition, and to abate any permanent obstruction or encroachment which would interfere with their present, or *might interfere* with their future, use by the public as the progress of the city may demand. *Joseph v. City of Austin*, 101 S.W. 2d 381; *City of San Antonio v. Ashton*, 135 S.W. 757; *Coombs v. City of Houston*, 35 S.W. 2d 1066; *City of Lockhart v. Commissioners' Court of Caldwell County*, 278 S.W. 319. It is also held in *Joseph v. City of Austin*, supra, ". . . as against the public the city could not give the abutting property owners the right to construct permanent obstructions on any portion of a street dedicated to public use by map and plat of an addition."

As of present, the spur, with standing or moving railroad cars, is an obstruction in a public street, though not particularly hazardous. Seventh Street,

however, is a main artery from the west into downtown Fort Worth. When the projected improvement is completed whereby Seventh Street will join with an existing freeway system, traffic to the east will increase enormously along Seventh Street where the spur is situated. The continued use of the spur track would constitute a serious menace to the traveling public.

It was held in *Town of Ascarate v. Villalobos*, Sup., 223 S.W. 2d 945: "No one has the inherent right to carry on his private business upon the public streets of a town or city. In order to protect the public from dangerous hazards, it is the plain duty of a town or city to make and enforce regulations concerning the use of its streets, as well as for the convenience and protection of the public." Any private use of a street which in any degree detracts from, hinders or prevents its free use as a public way to its full extent is an obstruction. *Hover v. Oklahoma City*, 271 P. 162.

The Supreme Court in *Texas & N. O. R. Co. v. Schoenfeld*, 146 S.W. 2d 724, held: "The rule has long been established in this State that material in railroad tracks is regarded as being personal property, and in erecting spur tracks and other tracks on land not owned by it, upon discontinuance of the tracks the railroad company could remove the material of which they were made. It has also been held that material in a railroad track remains personal property, and does not become a part of the underlying real estate," and further that the plaintiff on whose land the railroad was situated could not claim tracks

as permanent fixtures. It is to be remembered that the spur in the instant suit was not on plaintiff's land, nor will any of plaintiff's land be taken; the spur track did not belong to plaintiff and was not constructed by the plaintiff, but was constructed and owned by the Railroad. There was no pleading or or proof that the Railroad had any contractual obligations with the Plaintiff to continue to operate upon and serve plaintiff on the spur. It is generally held that, apart from special contract, no right of action for damages against a railway company arises on the part of one who suffers damages by removal or abandonment of a spur track or station which serves his business, or which he has been accustomed to use, the reason generally given being that the railway company is under no implied obligation to continue the use of such track or station, or that the injury is not a special damage differing in kind from that sustained by the public generally, although it may be greater in degree, and that it is not, therefore, of a nature which may constitute the basis of a cause of action, but is *damnum absque injuria*. 23 *A. L. R.* 556; *Helena & L. Smelting & R. Co. v. Northern Pac. Ry. Co.*, 204 Pac. 370; *Missouri, K. & T. Ry. Co. v. Colburn*, Sup. 38 S.W. 153.

It should follow that if plaintiff would have no action for damages against the Railroad if the Railroad should voluntarily abandon the spur, plaintiff could have no action for damages against the City of Fort Worth when in the proper exercise of its police power it removes the spur track in the interest of public safety and interest.

It has been held that an abutting owner is not entitled to damages for loss of an operation which could not be carried on without the use of city property, *Hammer v. City of Dallas*, 273 S.W 2d 646; that "No use of the street by any of the plaintiffs can ripen into a private right by lapse of time, or by reason of the fact that they contributed as they did to the making of improvements in the street," *City of Fort Worth v. Gilliland*, Com. App., 169 S.W. 2d 149; abutting property owner has no property interest in curb taken up by city even though he had paid for the curb, *Gillespie v. Fuller Const. Co.*, 66 S.W. 2d 798, writ ref. It will be recalled plaintiff in the instant case did not build or pay for the spur.

In *Bowers v. City of Taylor*, 24 S.W. 2d 816, the Commission of Appeals held that a city is a trustee for the public and, regardless of in whom the fee to the roadway may be, the city must always remain in position to exercise its legislative power when required.

In view of the authorities, we are convinced that plaintiff did not acquire such an easement or vested interest in the spur track in question that the removal of same would be a "taking" without compensation under the State and Federal Constitutions.

The judgment of the trial court is reversed and judgment rendered that plaintiff has no cause of action against the City of Fort Worth by reason of the removal of the spur track in question.

Thomas J. Renfro,
Associate Justice.

APPENDIX C

IN THE SUPREME COURT OF TEXAS
AUSTIN

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October 3, 1962.

No. A-9119.

Southwest Magazine
vs.
City of Fort Worth
} From Tarrant County, Second District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused. It is further ordered that the applicant, Southwest Magazine, pay all costs incurred on this application.

October 31, 1962.

No. A-9119.

Southwest Magazine
vs.
City of Fort Worth
} From Tarrant County, Second District.

Petitioner's motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.